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IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-47

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,

Petitioners,

v.

CLARENCE BOREL,

Respondent.

REPLY OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

MARLIN THOMPSON
STEPHENSON & THOMPSON
712 Division Street
Orange, Texas 77630

COUNSEL FOR RESPONDENT

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Respondent, Clarence Borel (through his widow, Thelma Freida Borel) opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 10, 1973 and the denial of the motion for rehearing entered on May 13, 1974.

REASONS FOR REFUSING THE WRIT

1. *Borel had not been warned, as a matter of law, by the enactment of the Texas Workmen's Compensation Statute* (Petitioners' First Question).

The defendants' contention is that the Texas Legislature performed and discharged the duties incumbent upon the defendants to warn in a strict liability action concerning any products containing asbestos that may produce asbestosis.

The rule that all persons are conclusively presumed to know the law when applied to the instant case means simply that Mr. Borel was presumed to know that asbestosis is a compensable occupational disease under the Texas Workmen's Compensation Act, and for purposes of workmen's compensation is presumed to know that it is defined as set forth in the Statute. *THIS IS THE EXTENT OF THE PRESUMPTION – NO MORE.* The contention is contrary to the prior contentions of the defendants that they did not warn because of their lack of knowledge. Judicial notice that asbestosis is covered under the Texas Workmen's Compensation Statute has nothing to do with the knowledge of risk from using the products so that a court can hold as a matter of law that Borel knew and appreciated the dangers involved and voluntarily assumed the risk. This was submitted to the jury, and they found against defendants.

The principle that a person is presumed to know the law and the rules and effect of judicial notice are two completely unrelated items, and judicial notice goes only to the question of legal proceedings followed by the courts and applied to trials. The question here is not whether Borel knew the law. The question is one of fact concerning assumption of risk.

To hold that Borel assumed the risk as a matter of law because of the Texas Workmen's Compensation Act, would have the effect of determining as a matter of law that the defendants were not liable under any circumstances and would deny Borel the right of trial by jury on a fact question.

2. The judgment of the Fifth Circuit is not in conflict with another Court of Appeals on substantive or procedural matters.

Petitioners claim:

(a) *The failure to submit an interrogatory to the jury denied the defendants' defense of "assumption of risk" and right to a trial by jury* (Petitioners' Second Question).

(b) *That the opinion fails to follow Rule 49 (a) and is in conflict with other opinions of the Fifth Circuit and an opinion of the Fourth Circuit Court of Appeals* (Petitioners' Third Question).

(c) *The trial court in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved deprived defendants of a trial by jury* (Petitioners' Fou th Question).

"The trial court submitted this case to the jury on general instructions and special interrogatories . . . ." (Appendix to Petition, Page A-60, Opinion on Motion for Rehearing) and not on special interrogatories alone, as stated by the defendants in their petition, at page 16. The trial court instructed the jury, ". . . . if you find from a preponderance of the evidence that the deceased knew of the dangerous nature of the asbestos products with which he was working and appreciated the danger of working with such products or that he had knowledge through his contractor of the dangerous nature of the product and that he assumed the risk by continuing his work, then you would find against the plaintiff and in favor of the defendants." As stated by the Fifth Circuit, "What more could the defendants want?" The instruction was overly favorable to the defendants, and the jury still found against the defendants that Borel did not assume the risk.

Respondent further contends that there is no conflict with the decision of the Fifth Circuit Court of Appeals and the case cited by petitioners of *McGrath v. Wallace Murray Corp., 10th Cir., 496 F. 1d 229,* because both the Fifth Circuit and the Tenth Circuit held that the entire charge must be viewed in passing upon the

sufficiency of the charge, the omission of particular instructions, or the form of instructions. Neither is there a conflict with the holdings in the cases cited by petitioners at page 17 of their petition (*Scott v. Isbrandsten Co., 4th Cir. 1964), 327 F. 2d 113; Palmiero v. Spada Distributing Co., 9th Cir. 1954), 217 F. 2d 561; Duke v. Sun Oil Co., 5th Cir. 1963, 320 F. 2d 853).* In the *Duke* case the trial court did not give instructions or special interrogatories concerning certain issues raised by the evidence. The Fifth Circuit held that the court must submit the phase of the case which had been raised by the pleadings and evidence on controlling issues to the jury under appropriate instructions.

Rule 49 of the Federal Rules of Civil Procedure gives the trial court wide discretion in the wording and form of verdicts, and as held by the Fifth Circuit, the trial court did not abuse its discretion. See Rule 49, Federal Rules of Civil Procedure, and the cases cited in the Fifth Circuit original opinion, Page A-41 of Appendix to Petitioners' Petition.

Under the trial court's instruction, the jury found the products of the defendants were "defective" and "unreasonably dangerous" as to Borel at the time that the products were sold by the defendants.

The finding of defective and unreasonably dangerous products necessarily involved the balancing of the utility of the products and was covered in the instruc-

tions of the trial court to the jury. The defendants are asking the Supreme Court to hold contrary to the summary of Page Keeton, *Torts, in 22 S. W. L. J., Page 4,* wherein he says:

> *". . . . If, in other words, the utility of a product is outweighed by the dangers involved in its use, the maker is subject to liability, however excusable he was for being ignorant or unaware of the dangers, and even if some of the risks were scientifically unknowable at the time of the production and sale of the product. The fact that the maker was not negligent, and was excusably ignorant of the condition or the dangers thereof, is immaterial."*

Petitioners are asking the Court to instruct the jury that "liability could not be imposed if the utility of the product outweighed the danger involved." This would be holding as a matter of law that a manufacturer of any product would not have any duty to warn. This is not the law. *Davis v. Wyeth Laboratories, Inc., 5th Cir. 1968, 399 F. 2d 121; Messick v. General Motors Corporation, 5th Cir. 1972, 460 F. 2d 485; Keeton, Torts, 22 S. W. L. J. 4; Keeton, Products Liability, 48 Tex. L. Rev. 398.*

This Court should not consider a contention that as a matter of law, the defendants are not liable to Borel or could never be liable in any fact situation under strict liability for the marketing of their products.

3. In reply to the Petitioners' Fifth and last Question, the Respondent says that the holding of the Fifth Circuit which follows the substantive law of Texas on strict liability is not in conflict with decisions of the Supreme Court of Texas or in violation of Article I, Section 16 of the Constitution of the State of Texas.

Following the strict liability rule in Texas as announced by *McKisson v. Sales Affiliates, Inc., 1967, 416 S. W. 2d 787,* and subsequent cases by the Texas courts, does not constitute a bill of attainder, ex post facto law, a retroactive law, or any law impairing the obligation of contracts. *Calder v. Bull, Supreme Court 1798, 3 U. S. 386, 1 L. Ed. 648;* adopted by Texas in *Bender v. Crawford, 33 Tex. 745 (1871).*

The doctrine of strict liability is not a statute and is not penal in nature. *Mellinger v. City of Houston, 68 Tex. 37, 3 S. W. 249 (1887),* cited by the defendants, is not in point, because the case merely holds that the Texas Constitution prohibits the retroactive effect of any statutes and not court decisions.

The traditional common law view is that a court decision has unlimited retroactive operation. In overruling a prior decision, the court does not make new law, but asserts what the law really was all the while. In the case of *Linkletter v. Walker, 1965, 381 U. S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731,* the United States Supreme Court said that, ". . . . the Constitution neither

prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject.'"

In the case of *Storrie v. Cortes, 1896, 90 Tex. 283, 38 S. W. 154,* in dealing with ex post facto or retroactive laws, the Texas Supreme Court held, ".... a decision of a court is not law within the provision of the Constitution of the United States. . . .".

The retroactive effect of an overruling decision is neither required nor prohibited by constitutional provisions, but a matter of judicial policy to be determined by the court and weighing whether retroactive application will further or retard its operation. *Linkletter v. Walker,* cited above.

The Supreme Court of Texas in the *McKisson* case could have limited prospectively its decision on strict liability. It did not do so, and therefore, the doctrine of strict liability would apply both retroactively and prospectively.

Because of *McKisson* being decided in 1967 and some defendants placing an insignificant caution on their products in 1966, the petitioners are now seeking to eliminate any liability to any asbestos worker brought about by their silence or secreting of knowledge concerning their unreasonably dangerous products. To hold that the doctrine of strict liability in Texas

in this case would operate prospectively only would be holding as a matter of law that an insulation worker had no cause of action regardless of the facts.

Conclusion

Because there does not exist any special and important reasons, the Fifth Circuit opinion is not in conflict with another Court of Appeals or the applicable State law, and has not sanctioned a departure of a lower court from the usual and accepted course of proceedings so as to call for the exercise of the Supreme Court's power of supervision, and because of the reasons hereinabove set forth, this Honorable Supreme Court should deny petitioners' application for writ of certiorari.

Respectfully submitted,

MARLIN THOMPSON
STEPHENSON & THOMPSON
712 Division Street
Orange, Texas 77630

ATTORNEY FOR RESPONDENT,
Clarence Borel

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 1974, three copies of the Reply of Respondent Opposing Petition For Writ of Certiorari were mailed by Certified Mail, postage prepaid, to the following counsel for Petitioners and Intervenor:

George A. Weller
P. O. Box 350
Beaumont, Texas 77704
Attorney for Petitioner,
Fibreboard Corp.

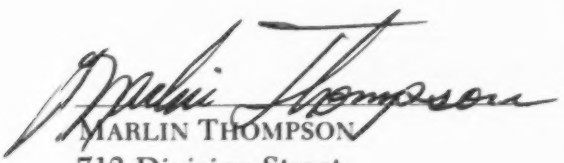
John G. Tucker
Beaumont Savings Bldg.
Beaumont, Texas 77701
Attorney for Petitioner,
Ruberoid Company

John G. Tucker
Gordon R. Pate
John Pike Powers IV
San Jacinto Building
Beaumont, Texas 77701
Attorneys for Petitioner, Johns-Manville Products Corporation

W. N. Arnold, Jr.
Bank of the Southwest Bldg.
Houston, Texas 77002
Attorney for Petitioners, Armstrong Cork Co. and Philip Carey Corp.

George E. Duncan
Petroleum Building
Beaumont, Texas 77701
Attorney for Petitioner, Pittsburgh Corning Corporation

George E. Murphy
San Jacinto Building
Beaumont, Texas 77701
Attorney for Intervenor, National Surety Corp.



MARLIN THOMPSON
712 Division Street
Orange, Texas 77630

COUNSEL FOR RESPONDENT